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Supreme Court, U.S.
FILED

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No.

In The Supreme Court of the United States

JUAN PEQUENO,

Petitioner,

v.

MICHAEL SCHMIDT,
Ch7 Trustee,

Respondent,

Petition For A Writ Of Certiorari
To Review The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This litigation involves the same above parties and derives from the same bankruptcy cause #01-24255 originally filed on December 31, 2001. The earlier bankruptcy appellate ruled in Pequeno v. Schmidt, 307 B.R. 568 (S.D. Tex. 2004), on March 31, 2004, that Pequeno had an 'absolute right to convert' to Ch13 which had been unlawfully denied by the lower Bankruptcy court based on Trustee Schmidt's false allegations. The Court ruled that because Pequeno had been granted Ch13 conversion, prior to Ch7 Trustee Schmidt's conditional settlement, it was Pequeno was authorized to settle Pequeno's Judgment, and not Trustee Schmidt, thus rendering moot the alleged conditional settlement of September 25, 2002.

Pursuant to superior appellate court's ruling on granting Pequeno's Ch13 conversion, the Bankruptcy Court finally entered order on July 20, 2004 adhering to superior court's decisions.

In spite of Bankruptcy court's order of conversion on July 20, 2004, Trustee Schmidt still continued in 'bad faith' filing multiple motions attempting to re-convert Pequeno's estate back to Ch7. On Trustee Schmidt's 2nd attempt to re-convert Pequeno's Ch13 chapter, Bankruptcy court entered order to re-convert Pequeno to Ch7 and

then proceeded to assign Trustee Schmidt to again administer the estate.

Trustee Schmidt then quickly proceeded to cash-out Pequeno's Final Judgment of $400,000 which Trustee Schmidt reduced to $140,000 in agreement with City of Brownsville which had initially illegally dismissed Pequeno. Pequeno had a 100% pay plan to pay all creditors and save Pequeno's home of twenty years. But instead Bankruptcy court allowed Trustee Schmidt to pay the full amount of $140,000 to himself, and his hired attorneys, with creditors getting ('0') zero.

Trustee Schmidt's main argument was that Pequeno's Judgment was not pledged in Pequeno's Ch 13 plan, *contrary to record evidence.*

Clearly, Trustee Schmidt has chosen to compromise his ethics of law for his obvious benefit of money.

Pequeno clearly pledged his Judgment in his filed Ch13 plan of July 23, 2004, Bankruptcy docket#184. Pequeno has a right to re-organize in a Ch13 and to say otherwise is in conflict with the new Bankruptcy law of April 2005 which became effective in October 17, 2005, and is in conflict with U.S. Supreme court and other Federal courts.

Our basic foundation of rule of law is based on the record of evidence before the Courts. All of our American courts depend on the foundation of the record of evidence before the Courts. The new Bankruptcy law states that if a debtor works, debtor should be reorganizing in a Ch13. Pequeno

is a debtor who has been working and should be reorganizing in a Ch13 but was unlawfully denied Ch13 by Bankruptcy Court because of greed by Trustee Schmidt.

The different Federal Circuit Courts have applied the harsh dismissal for want of prosecution only as a last resort, after other less harsh actions have been tried such as notifying plaintiff, since in instance case, Pequeno has already filed over 20 pages in an answer to a motion to dismiss, and this was pending before the lower District Court. The 5th circuit of Appeal instead of hearing case has chosen to merely state that res judicata applies even though the merits have not been heard. This is contrary to other Federal Circuit Courts and the recent Supreme Court rulings on whether dismissal for want of prosecution is merits of adjudication.

There was no res judicata since this 5th Circuit appeal#07-41074 would have been the 1st time that District Court actually would have reviewed the issue of denying administrative fees to Schmidt and hired firms since Schmidt breached his fiduciary duties by violating Bankruptcy Rules §327 by failing to remain a disinterested party. The 2nd appeal was procedurally dismissed for want of prosecution and does not qualify as res judicata.

The 5th Circuit ruling of res judicata in appeal#07-41074 is in conflict with the other U.S. Supreme court and other Federal Circuit courts.

The question presented therefore is, whether the 5th Circuit court of Appeals can dismiss an appeal as res judicata when merits of the case have not been heard contrary to U.S. Federal rules and U.S. Constitutional Law, and is in conflict with decisions of U.S. Supreme Court and other Federal Circuit Court of Appeals.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS v

TABLE OF AUTHORITIES vii

OPINION BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....1

STATEMENT OF CASE 2

SUMMARY AND REASONS FOR WRIT.....14

CONCLUSION 19

APPENDIX

Appendix A - 5th Circuit Court of Appeals Opinion of Res Judicata Dismiss, November 12, 2008.....1a

Appendix B - District Appellate Court's
Order affirming Bankruptcy Order
filed on September 27, 2007.....3a

Appendix C - Bankruptcy Court's Order
Denying Debtor's Motion to Deny
Administrative and/or Recovery Fees
filed on October 8, 2004.....17a

TABLE OF AUTHORITIES

Cases

In Matter of Pequeno, cause no. #01-24255
S. D. Tex. 2001.....2

Pequeno v. City of Brownsville, cause no.
B-00-cv-180, Southern District Court of
Texas, Judge Tagle presiding,
November 2000.....2

Pequeno v. Schmidt, 307 B.R. 568
(S.D. Tex. 2004).....2

Pequeno v. Schmidt, no.04-40573,
(5th Circuit Court of Appeals, March 2005).....5

Statutes

11 U.S.C. § 706(a).....3
11 U.S.C. § 1307(c).....3
28U.S.C. §1254(1).....1
42U.S.C. § 1983.....2

OPINION BELOW

The Opinion by the Fifth Circuit Court of Appeals is docketed in 5th Circuit appeal#07-41074 and was filed on November 12, 2008. The decision of the United States District Appellate Court for the Southern District of Texas is reported in civil cause #05-cv071, was filed on September 27, 2007. The decision by the Bankruptcy Court for the Southern District of Texas is reported in civil cause#01-24255, docket#209, filed on October 8, 2004.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Order of the United States Court of Appeals for the Fifth Circuit was entered on November 12, 2008.

CONSTITUTIONAL PROVISIONS AND STATUTES

Title 11 U.S.C. § 1307(c) states the following:

" (c) Except as provided in subsection (e) of this section on request of a party in interest or the United States trustee and after notice and hearing, the court may convert

a case under chapter this chapter to a case under chapter 7 of this Title or may dismiss a case under this chapter whichever is in the best interests of creditors and the estate, for cause, including –"

STATEMENT OF THE CASE

A. Factual Background

The following history of Pequeno's case can be found in previous Bankruptcy appeal#03cv029 Order of March 31, 2004, in which Pequeno was granted Ch13 conversion and same decision was then affirmed by the 5th Circuit Court of Appeals, appeal#04-40573 on March 4, 2005. (See 5th Circuit Court of Appeals, opinion of March 4, 2005, #04-40573)

On December 31, 2001, Appellant, Juan Pequeño ("Pequeño."), *pro se*, filed a petition for relief under Chapter 7 of the Bankruptcy Code[1] since Pequeno's home of 20 years with over $30,000 of equity was scheduled to be foreclosed the next day which was New Years Day.

Pequeno had had difficulty paying for his home after Pequeno's previous employer, the City of Brownsville, dismissed Pequeno illegally, by

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1 Pequeno v. Schmidt, 307 B.R. 568 (S.D. Tex. 2004)

violating Pequeno's First Amendment of freedom of speech. Pequeno who previously was the Management Information System Director for the City of Brownsville, spoke to the Mayor, City Commissioners, and the public, at a public meeting, stating that the purchase of an outdated DOS-based software for EMS, would significantly and adversely affect the all time record high revenue of over a million dollars.

On November 27, 2000, Pequeño filed a Title 42 U.S.C. §1983 lawsuit in this Federal court.[2]

Pequeno advised his attorney at the time, Frank Costilla, that Pequeno was at risk of losing Pequeno's home, but Attorney Costilla stated to Pequeno that there was nothing that Mr. Costilla could do concerning this issue. This is when Pequeno decided to file for Bankruptcy.

After Mr. Costilla discovered that Pequeno had filed for Bankruptcy, Mr. Costilla recommended to Pequeno to dismiss the Bankruptcy.

Bankruptcy Court denied Pequeno's Motion to dismiss, based on Chapter 7 Trustee Michael Schmidt's, ("Trustee Schmidt"), objection. Trustee Schmidt objected because he now knew that Pequeno had a won a substantial Judgment, and

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2 *Pequeño v. City of Brownsville*, Cause No. B-00-180; Judge Tagle presiding.

Trustee Schmidt planned to settle the Judgment for his personal gain.

Trustee Schmidt allowed creditors to receive a letter which stated that this was a 'no-asset' case and creditors were told not to file proof of claim. Consequently, creditors were discharged prior to Trustee Schmidt's proposed settlement of September 16, 2002.

The suit against the City of Brownsville was brought to trial on February 8-12, 2002 and was found to meet the criteria required pursuant to Title 42 U.S.C. §1983. Upon the verdict of the jury for Pequeno, the Honorable Judge Hilda Tagle entered a judgment in favor of Pequeño, in the amount of $400,359 plus $20,385 for attorney's fees (the "judgment").

The judgment is dated March 26, 2002. The City of Brownsville appealed the judgment to the United States Court of Appeals for the Fifth Circuit.

Pequeno made know to Trustee Schmidt that Pequeno planned to convert to Ch13 in order to pay for his homestead and other creditors; however, Trustee Schmidt stated that he would object in order to keep Pequeno in a chapter 7.

Trustee Schmidt's objection was in bad faith since in a conflict of interest, in breach of fiduciary duties, and against the best interest of creditors, Trustee Schmidt has been trying to control Pequeno's Judgment by keeping Pequeno in a Ch 7, hence the objection.

In spite of this, as evidenced by Bankruptcy docket, on July 17, 2002, Pequeno filed a 'Motion to Convert to Ch13', Dkt#50 pursuant to Title 11 U.S.C. § 706 (a) Bankruptcy Conversion rules. Pequeno had an 'absolute right' to convert to Ch13 pursuant to Bankruptcy law.

As shown in Bankruptcy docket, on August 7, 2002, the Bankruptcy Court held a hearing on Pequeno's Motion to Convert and granted same motion.The Order of August 7, 2002 was entered in Bankruptcy docket on same date.

This Order of August 7, 2002 was neither revoked nor vacated by Bankruptcy Court, nor was the Order objected to by Trustee Schmidt, as evidenced in Bankruptcy docket.

Bankruptcy Court held hearing on October 9, 2002 and discussed whether to deny Pequeno's Ch13 conversion and whether to deny Pequeno's claim of property exemption, eventhough Bankruptcy court had already granted Pequeno's Ch13 conversion on August 7, 2002.

Prior to this same October 9, 2002 hearing, on September 10, 2002 the Bankruptcy Court docket evidences that Bankruptcy Court, in violation of Bankruptcy Conversion rules, Ordered that Trustee Schmidt could settle Pequeno's Judgment of $400,000 at the 5th Circuit, cause#02-40600, contingent on whether Pequeno was in Ch13 or a Ch7.

Also, prior to this same October 9, 2002 hearing, on September 25, 2002 Bankruptcy Court docket evidences that Bankruptcy Court in violation of Bankruptcy Conversion Title 11 U.S.C § 706 (a), approved Trustee Schmidt's $140,000 settlement of Pequeno's $400,000 Judgment, Dkt#75.

The Settlement of the September 25, 2002 Order, Dkt#75 was contingent on whether the Bankruptcy Court found that Trustee Schmidt was the sole owner of Pequeno's property pursuant to Bankruptcy conversion rules.

At the hearing of October 9, 2002, Bankruptcy Court decided to schedule Briefs and took the issues under advisement.

On November 7, 2002, Bankruptcy Court docket evidences that Bankruptcy Court, in violation of Title 11 U.S.C. §706(a) Bankruptcy Conversion rules, denied Pequeno's Ch13 conversion of August 7, 2002, denied Pequeno's objection to Schmidt's wrongful settlement of September 25, 2002, denied Pequeno's objection to Trustee Schmidt's wrongful authority to settle, and denied Pequeno's August 29, 2002 exemption claim of Pequeno's Judgment. The above 4 Bankruptcy Orders of November 7, 2002, were timely appealed by Pequeno on November 22, 2002.

Ruling by the Honorable Judge Andrew Hanen

On March 31, 2004, the Honorable Judge Andrew Hanen, pursuant to Title 11 U.S.C §706 (a) and §348 (e), Ordered that Bankruptcy did not have authority to deny Pequeno's absolute right to convert to Ch13 as of August 7, 2002, and reversed Bankruptcy Court's denial of Pequeno's Ch13 conversion, and thus rendered 'moot' the Settlement Order of September 25, 2002 which was contingent on whether Pequeno was found to be a Ch13 debtor. *See Pequeno v. Schmidt, 307 B.R. 568 (S.D. Tex. 2004)*

Ruling by the 5th Circuit Court of Appeals affirming Judge Hanen's 3/31/04 order

On March 4, 2005, the 5th Circuit Court of Appeals (In Pequeno vs Schmidt, cause#04-40573, 2004) affirmed the District Appellate ruling of Pequeno's right to Ch13 conversion as of August 7, 2002, pursuant to Bankruptcy Law.

Bankruptcy Court simply did not have authority to grant to Trustee Schmidt, the right to settle any of Pequeno's property as of August 7, 2002, pursuant to Title 11 U.S.C §706 (a) and §348 (e) Bankruptcy conversion law.

Trustee Schmidt's continuance interference against Pequeno's Ch13 confirmation

Ch7 Trustee Michael Schmidt continued to oppose Pequeno's Ch13 conversion even after Pequeno was rightfully granted Ch13 by superior court cause#03cv029, and affirmed by 5th Circuit of Appeals#04-40573.

On May18, 2004, bankruptcy docket#170, Trustee Schmidt filed 1st motion to 'Cross' to reconvert to Chapter 7, wrongfully alleging that Pequeno did not qualify for Ch13 status and that creditors had already been discharged, now filing as creditor instead as Ch7 Trustee Schmidt.

At Bankruptcy hearing of July 7, 2004, Bankruptcy ruled to adhere to Honorable Judge Hanen's Order of March 31, 2004 and ruled orally to convert Pequeno to Ch13 and entered order on July 20, 2004 to convert to Ch13.

At same hearing of July 7, 2004 Bankruptcy Court also ruled to allow Trustee Schmidt, to file motion to reconvert Pequeno to Ch 7, eventhough Pequeno had been wrongfully harmed by Trustee Schmidt's wrongful accusations of 'bad faith' and wrongful legal authority that Pequeno could not convert to Ch13 and Bankruptcy Court ruling in favor of Trustee Schmidt and thus harming Pequeno's estate and creditors and set hearing to hear Trustee Schmidt's 'Cross' motion for August 4, 2004.

On July 20, 2004, Bankruptcy court entered noticed that Ch13 Trustee Boudloche was now the assigned Ch13 Trustee for Pequeno's case and removed Trustee Schmidt from case.

On July 23, 2004 Pequeno filed Ch13 plan, bankruptcy docket#184, in compliance with Bankruptcy order of July 20, 2004 and pledged Pequeno's Judgment with a 100% payment plan to creditors.

On August 3, 2004 Pequeno filed motion to vacate Discharge of Creditors, bankruptcy docket#188, as proof of 'good faith' that Pequeno would be including and paying his creditors in his Ch13 plan. This motion was opposed by Trustee Schmidt and was set for hearing on October 6, 2004.

At Bankruptcy hearing of August 4, 2004, Bankruptcy court heard again Trustee Schmidt's allegations that Pequeno did not qualify to be in a Ch13 plan because creditors had been discharged, that Pequeno could not pay in Ch13 plan for 36 months and that his administrative fees were not included. Bankruptcy Court ruled to case these issues under advisement.

On September 13, 2004, which was actually filed on September 17, 2004, and not received by Pequeno until September 22, 2004 Bankruptcy Court entered Order denying Trustee Schmidt's motion to reconvert, bankruptcy docket#201, without prejudice to re-file again if Pequeno did not confirm his Chapter 13 plan by October 7, 2004.

Pequeno was given less than 2 weeks to have Pequeno's Ch13 plan confirmed eventhough Ch13 Trustee Boudloche is the Trustee that recommends confirmation before the Court, and Ch13 Trustee Boudloche had not even scheduled the '341 meeting' until October 6, 2004 for Pequeno's Ch13 confirmation, as proven by bankruptcy docket.

At October 6, 2004 hearing Bankruptcy Court granted Pequeno's Motion to vacate discharge of creditors so that Pequeno could proceed with Ch13 confirmation, bankruptcy docket#203.

On October 6, 2004 Bankruptcy Clerk entered noticed that Ch13 Boudloche had set Ch13 341 meeting form November 5, 2004, bankruptcy docket#204.

On October 22, 2004, Trustee Schmidt filed Schmidt's 2nd attempt to reconvert Pequeno to a Ch7, bankruptcy docket#219 and chose to misconstrue the facts that Pequeno had 'failed to confirm Ch13 plan by October 7, 2004' when Trustee Schmidt knew that by his continual litigation that Trustee Schmidt's interfering was preventing Pequeno from having an actual chance of confirming to Ch13 in violation of Bankruptcy law. Also September 13, 2004, bankruptcy docket#201 order clearly stated that Trustee Schmidt would be allowed to refile his motion to reconvert if Pequeno had not converted by October 7, 2004.

Trustee Schmidt falsely stated to Bankruptcy Court that Pequeno had been attempting to convert to Ch13 since Hon. Judge Hanen's Order of March 31, 2004 and that Pequeno had had ample time to confirm, that Pequeno had not paid any payments to the plan for more than 2 years since August 2002, and that Pequeno had not filed a 100% plan that included his judgment, and that Pequeno had not included his administrative fees so plan could not be affirm.

On November 5, 2004 Pequeno filed his amended Bankruptcy schedules for his Ch13 plan in collaboration with Ch13 Trustee Boudloche's case manager recommendations, bankruptcy docket#230.

On November 5, 2004 Ch13 Trustee Boudloche held Ch13 341 meeting with Pequeno and made additional recommendations to Pequeno about designating that Pequeno would be paying for 36 months, that Pequeno formally file objection to claims to both creditors Trustee Schmidt and unsecured creditor Alejandra Tapiero, and that Pequeno make payments into plan prior to confirmation since the erroneous issue of delinquency of $16,000 would be going before the Judge Schmidt.

On November 30, 2004 Pequeno filed amended Ch13 plan, bankruptcy docket#243, that included Ch13 Trustee Boudlouche's recommendations.

On November 30, 2004 Pequeno filed amended schedules to Ch13 plan, bankruptcy docket#244, and made payments into Ch13 plan in accordance with Ch13 Trustee Boudlouche's recommendations.

On November 30, 2004 Pequeno filed Objection to Trustee Schmidt's proof of claim, bankruptcy docket#245, since the majority of his alleged fees were Trustee Schmidt's wrongful attempts to keep Pequeno from converting to Ch13 in the first place, and Pequeno also filed objection to proof of claim by unsecured creditor Alejandra Tapiero.

At Bankruptcy hearing of December 1, 2004, bankruptcy docket#249, following Ch13 Trustee Boudloche's recommendations, Pequeno filed in Bankruptcy court, exhibits proving Pequeno's filing of Ch13 100% plan, Pequeno's payments of 5 months into the plan, and Pequeno's objection to Trustee Schmidt's proof of claim.

On December 27, 2004, bankruptcy docket#257, Bankruptcy Court's entered Order to reconvert Pequeno from Ch13 to Ch7, which goes against the weight of the evidence and is in violation of Title 11 § 1307 since there existed 'No cause' to reconvert Pequeno to Ch7 in light of the evidence.

Should lower courts have allowed Trustee Schmidt who is an arm of the court get away with over $140,000 that was pocketed by himself, his own hired firm, and his hired attorneys with the creditors getting nothing?

Is this what Bankruptcy was setup to do? To enrich the pockets of the Trustees at the expense of the debtors and the creditors. Trustee Schmidt's own proof of claim is proof that Trustee Schmidt and his attorneys postured themselves to gain control of Pequeno's Judgment.

Because of Trustee Schmidt's false allegations, Pequeno was unlawfully denied Ch13 conversion back in October 2002 and consequently lost his home of 20 years, and then Trustee Schmidt has relentlessly pursued Pequeno's Judgment for his pockets by again bringing false accusations upon pro-se Pequeno, on appeal, Pequeno won the absolute right to convert on March 31, 2004, almost 2 years later but too late for his home and the only fraud found was on Trustee Schmidt who had been plotting from the beginning to gain control of Pequeno's Judgment. Trustee allowed creditors to get discharged so that he would get the entire Judgment.

Pequeno has lost his home of 20 years, and over $500,000, because of Trustee Schmidt's bad faith and Bankruptcy Court's blind approval of

obvious wrongdoings of Trustee Schmidt. Bankruptcy court has even stated to Pequeno that $400,000 is really not a lot of money in today's standards.

Choosing to deny record of evidence, such as Pequeno's Ch13 plan, and then falsely stating that Pequeno did not pledge his entire Judgment, is a smack of 'injustice' against the integrity of justice and what the Courts stand for.

Three years later, on September 27, 2007 District Appellate Court, cause#05cv071, affirmed the lower Bankruptcy Court on denying Pequeno's Motion to deny administrative fees to Trustee Schmidt and firms. Pequeno timely appealed to the 5th Circuit Court of Appeals. On November 12, 2008 the 5th Circuit entered Opinion to dismiss due to res judicata of Pequeno's appeal.

SUMMARY AND REASONS FOR WRIT

Petitioner Pequeno shows that the record evidences that Trustee Schmidt failed time and again to remain an disinterested party as required by Bankruptcy law. The bankruptcy docket evidences numerous attempts at controlling Pequeno's Judgment with lies and misrepresentation of facts before the Court. The 5th Circuit of Appeals courts has failed to address

this issue of Trustee Schmidt's bad faith and have erred by dismissing same appeal as res judicata eventhough the previous appeal was dismissed for want of prosecution and same issue was never address before the court.

On appeal, #03cv029, Trustee Schmidt was found to be disingenious with regard to contesting whether he knew of Pequeno's Judgment; District Court found that Trustee Schmidt knew from the onset, of Pequeno's Judgment.

In a desperate attempt to get paid, once Pequeno was converted to Ch13, Trustee Schmidt submitted his proof of claim of July 30, 2004, but deceivingly, this time, Trustee Schmidt omitted all meetings depicting Trustee Schmidt's actions towards obtaining Pequeno's Judgment, while leaving Pequeno's creditors and Pequeno out in the cold.

Trustee Schmidt's conduct to pocket all funds with nothing going to creditors, is in clear violation of Title 11 U.S.C.§ 327 (a), (e).

Pequeno has attended more than 80 hearings to defend what is rightfully Pequeno's estate, his homestead, his right to convert to Ch13, and his right to obtain Judgment to pay all his creditors 100%, but Trustee Schmidt has been allowed to deceive Pequeno's creditors and create conflict of interest with Pequeno's estate, in violation of Bankruptcy rules.

Simply, absolute power corrupts absolutely, Trustee Schmidt believes he is the arm of law that can manipulate the judicial system to his wishes, even in bad faith and with dirty hands, in violation of Bankruptcy law.

At the moment Trustee Schmidt believes that he can win in any higher courts on any wrongdoing that he has done to Pequeno's estate. One reason Trustee Schmidt believes this is because he has already distributed Pequeno's Judgment to himself, his own firm and his other hired firm, even if done unlawfully, because he has had the approval of the lower courts.

Pequeno asserts that Bankruptcy Court erred in not denying Chapter 7 Trustee's administrative fees of over $41,500 and the unknown contingency fee of Pequeno's Judgment, when Schmidt's own proof of claim evidences that Schmidt's firms are 'not' disinterested, pursuant to Bankruptcy Law.

Trustee Schmidt's proof of claim proves: that Schmidt's actions in Bankruptcy Court violated his fiduciary duties to creditors and Pequeno's estate, and Trustee Schmidt wrongfully opposed Pequeno's conversion to Chapter 13 because of Schmidt's personal conflict of interest.

Bankruptcy Law requires that Schmidt and his firms pursuant to §327 (a)(e), remain 'disinterested' parties and uphold their fiduciary duties to creditors through the life of the Bankruptcy.

Since the record evidences that Schmidt and his firms in fact have violated Bankruptcy Code §327 (a) (e) and that these same parties chose to compromise their position as disinterested parties by willfully:

a. not informing creditors that this case was an 'Asset' case but instead misleading creditors and allowing creditors to be discharged for Trustee's benefit, and by.

b. becoming the largest creditor in instant case and not informing the Bankruptcy court

Bankruptcy Court has the authority to remove any parties that is no longer a 'disinterested' parties as required by Bankruptcy Law.

Trustee Schmidt falsely stated to Bankruptcy Court that Pequeno had no interest in Pequeno's Judgment and could not convert to Chapter 13, and has wrongfully opposed Pequeno's conversion for over seven years now.

Bankruptcy Law provides that Trustee Schmidt and any party-in-interest must remain 'not' disinterested during employment and further must put creditor's rights above theirs. Trustee Schmidt and Schmidt's firms have not done so and have violated their fiduciary duties to creditors.

Trustee Schmidt and Schmidt's firms have taken advantage of Bankruptcy law to harm Pequeno and Pequeno's estate by wrongfully opposing Pequeno's conversion and Ch 13 confirmation as evidenced in docket for 'personal gain'.

Trustee Schmidt's own submittal of his own proof of claim, provides the primary evidence that Trustee Schmidt knew of Pequeno's Judgment from the onset eventhough Trustee Schmidt later denies this in court hearing. Instead Trustee Schmidt falsely states that it was Pequeno's fault.

Also Trustee Schmidt intentionally postured himself while Trustee of Pequeno's estate; Trustee Schmidt hired his own firm and signed a 50% contingency fee contract with Pequeno's previously dismissed attorney, Frank Costilla.

Before being hired by Trustee Schmidt, Costilla had actually stated to Pequeno that Costilla could not assist Pequeno in Bankruptcy, and Costilla also had a personal conflict of interest since Pequeno had a pending Motion to Amend Judgment which Frank Costilla later dismissed while being employed in Bankruptcy with Trustee Schmidt.

Trustee Schmidt continues to wrongfully oppose and abuse of Bankruptcy law against Pequeno, still continuing to deceive the Court, as an arm of the law, in order for the Court to deny Pequeno the right to convert to Chapter 13 and deny Ch13 confirmation.

Lower Courts have erred by allowing Trustee Schmidt's bad faith and unclean hands to continue for so many years, and allowing Trustee Schmidt to deceive Pequeno's creditors, and damage Pequeno's estate, for Trustee Schmidt and his hired firms' own gain, in violation of Title 11 U.S.C.§ 327 (a), (e), contrary to decisions made by other courts, which taints the integrity of the judicial system, and should be reversed.

CONCLUSION

Pequeno respectivefully requests for Petition for Writ since these rulings are contrary to the U. S. Supreme Court and other Circuit Court of Appeals rulings. The petition for a writ of certiorari should be respectivefully granted.

Respectfully submitted,

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February 10, 2009

APPENDIX A

IN THE UNITED STATES COURT OFAPPEALS
FOR THE FIFTH CIRCUIT

No. 07-41074

[Filed 11/12/2008]

In The Matter of: JUAN PEQUENO

Debtor

JUAN PEQUENO
Appellant

v.

MICHAEL B SCHMIDT;
Appellee

Appeal from the United States District Court for the Southern District of Texas, Brownsville,

1:05-CV-71

Before WIENER, GARZA, and DEMOSS, Circuit Judges.

PER CURIAM:

Appellant Juan Pequeno ("Pequeno") appeals, pro-se, the district court's denial of his appeal from a Bankruptcy Court Order Denying Debtor's Motion to Deny Administrative and/or Recovery Fees. Appellee Michael Schmidt ("Schmidt") is Pequeno's Chapter 7 Trustee.

We have previously addressed this case in several opinions, which collectively lay out the facts and posture below. 3 We resolved the issue at hand in *In re Pequeno*, 240 F. App'x 634 (5th Cir. 2007), in which we affirmed the district court's dismissal of several of Pequeno's claims, including his appeal of the bankruptcy court's Compensation Orders approving Trustee counsels' compensation. The district court dismissed those appeals for want of prosecution, as Pequeno failed to file timely briefs. *See id.* at 635. Pequeno's claim is barred by res judicata. A dismissal for failure to prosecute bars any futher adjudication, because it operates as an adjudication on the merits. Nielsen v. United States, 976 F.2d 951, 957 (5th Cir. 1992). We therefore AFFIRM the judgment of the district court. We also note that Pequeno has appeared before this court six times in this matter; at least four of the appeals)) including this one)) have been

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3 See In re Pequeno, 246 F. App'x 274 (5th Circ. 2007); In re Pequeno, 240 F. App'x 634 (5th Cir. 2007);In re Pequeno, 221 F. App'x 353 (5th Cir. 2007); In re Pequeno, 223 F. App'x 307 (5th Cir. 2007);In re Pequeno, 126 F. App'x 158 (5th Cir 2005).

frivolous. Pequeno is warned that future frivolous filings will subject him to sanctions.

/s/_WIENER, GARZA, DeMOSS

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
-BROWNSVILLE DIVISION-

	§	[Filed 9/27/07]
JUAN PEQUENO	§	
	§	
Appellant,	§	Civil No. B-05-071
	§	
v.	§	
	§	
MICHAEL B. SCHMIDT,	§	
TRUSTEE	§	
Appellee.	§	

ORDER

Pending before this Court are Juan Pequeno's ("Pequeno") appeal (Docket No. 1) of the Bankruptcy Court's Order Denying Debtor's Motion to Deny Administrative and/or Recovery Fees (Bankr. Docket No. 209) and Truste Michael B. Schmidt's ("Schmidt") Motion to Dismiss Multiple Appeals. (Docket No. 21). Pequeno submitted a brief in support of this appeal on May 12, 2005 (Docket No. 8) to which Schmidt answered on May 18, 2005 (Docket No. 9). Schmidt filed his motion

to dismiss on January 13, 2006 (Docket No. 21) to which Pequeno responded on February 2, 2006 (Docket No. 22). On April 13, 2006, Pequeno appealed an order of this Court (Docket No. 26) denying Pequeno's motion for "Reconsideration of Order of March 13, 2006 Concerning the Issue that Appellant is Chapter 13 Debtor in Possession Pursuant to 5th Circuit Opinion of March 4, 2005 and Pursuant to FRCP § 59(e)" (Docket No. 25) to the Fifth Circuit Court of Appeals. (Docket No. 27). On August 21, 2007, the Fifth Circuit dismissed Pequeno's appeal for want of prosecution (Docket No. 39). This Court now considers Pequeno's appeal to this Court as well as Schmidt's motion to dismiss.

Pequeno appeals the Bankruptcy Court determination that Schmidt properly employed his own law firm in accordance with 11 U.S.C. §§327(a),(d) and properly employed the Law Offices of Frank Costilla with the approval of the Bankruptcy Court in accordance with 11 U.S.C §327(e).

I. BACKGROUND AND STANDARD OF REVIEW

The Law Offices of Frank Costilla (the "Costill firm") represented Pequeno during his wrongful termination of employment action against the City of Brownsville (the "City"). During the pendency of this action, Pequeno filed a bankruptcy petition under Chapter 7. Pequeno did not list the

pending action on his schedule of assets. Schmidt was appointed as the trustee for Pequeno's bankruptcy estate.

In February 2002, Pequeno won a judgment of $400,000 against the City. The City filed an appeal of the judgment. Schmidt, as trustee, sought authorization from the Bankruptcy Court to hire the Costilla firm to continue working on the appeal and eventual settlement of the lawsuit with the City. Schmidt also sought authorization from the Bankruptcy Court to hire his own firm, The Law offices of Michael B. Schmidt (the "Schmidt firm"), to handle litigation issues regarding the bankruptcy estate. The Bankruptcy court, in both instances, authorized Schmidt to hire the firms.

This Court may only disturb a factual finding of the Bankruptcy Court if such finding is clearly erroneous. Sequa Corp. v Christoper, 28 F.3d 512, 514 (5th Cir. 1994). A finding is clearly erroneous when, although there is enough evidence to support it, the reviewing court is left with a firm and definite conviction that a mistake has been committed. Id. This Court may not make independent factual findings. See id.

This Court reviews the Bankruptcy Court's conclusions of law de novo. Matter of Oxford Management, 4 F.3d 1329, 1333 (5th Cir. 1993).

II. Pequeno's Appeal of the Bankruptcy Court Orders Authorizing the Employment of the Schmidt and Costilla Firms is Untimely and Barred by the Doctrine of Res Judicata

The Bankruptcy Court authorized the employment of the Schmidt firm and the Costilla firm in 2002. (Bankr. Docket No. 32); (Bankr. Docket No. 40). Pequeno did not appeal those authorizations at that time. Instead, Pequeno appears to appeal those authorization orders two years later through this separate appeal of the Bankruptcy Court's denial of his Motion to Deny Administrative and/or Recovery Fees. (See Appellant's Brief, p. 6);(Bankr. Docket No. 209). Because Pequeno failed to appeal to the authorizations at the time they were made, Schmidt argues the authorizations are final and non-appealable.

"An arrangement confirmed by a bankruptcy court has the effect of a judgment rendered by a district court. Any attempt by the parties to re-litigate any of the matters that were raised or could have been raised therein is barred under the doctrine of res judicata." In re Baudoin,981 F.2d 736, 739 (5th Cir. 1993). A bankruptcy order bars a subsequent suit if: (i) both cases involve the same parties: (ii) the prior judgment was rendered by a court of competent jurisdiction; (iii) the prior decision was a final judgment on the merits; and (iv) the same cause of action is at issue in both cases. *Id.*

Pequeno and Schmidt were both involved in the Bankruptcy Court orders authorizing the employment of the Schmidt firm and the Costilla firm. (Bank. Docket No. 31); (Bankr. Docket No. 32;

(Bankr. Docket No. 36); (Bankr Docket No. 40). This satisfies the first prong. Sections 327(a), (d), and (e) authorize bankruptcy courts to decide whether the employment of a particular attorney or law firm is proper under the Bankruptcy Code, satisfying the second prong.

With regard to the third prong, an order from the bankruptcy court is appealable if it constitutes a "final determination of the rights of the parties to secure the relief they seek," or a final disposition "of a discrete dispute within the larger bankruptcy case for the order to be considered final." In re Orr, 180 F.3d 656, 659 (5th Cir. 1999) (quoting In re Texas Extrusion Corp.,844 F.2d 1142, 1155 (5th Cir. 1988)). Schmidt contends the employment orders were final decisions on the issues of the qualifications of the firms, whether there were any conflicts of interest and whether the employment of the firms would be in the best interest of the bankruptcy estate. The Bankruptcy Court ruled on these elements as required under Sections 327(d) and (e) of the Bankruptcy Code. (See Bankr. Docket No. 32);(Bankr. Docket No. 40). This Court agrees.

An appeal from a final order of a bankruptcy judge to the district court must be taken by filing a notice of appeal within ten (10) days of the date of entry of the final order. Fed. R. Bankr. P. 8001, 8002(a). Pequeno failed to appeal within ten days of the authorization of either the Schmidt firm or the Costilla firm. The bankruptcy order therefore

was a final judgment on the issue of whether the employment of these firms was proper. The third prong of Baudoin has been satisfied.

Pequeno's appeal asks this Court to rule on whether these authorizations by the Bankruptcy Court violated 11 U.S.C § 327. (Appellant's Brief, p.6) Schmidt argues that the doctrine of res judicata bars the relitigation of these issues because Pequeno failed to appeal the actual bankruptcy order employing the firms. This Court agrees that to the extent Pequeno is appealing the orders authorizing the employment of the firms, this appeal is barred under the doctrine of res judicata.

This Court also notes that the motion from which Pequeno currently appeals (Bankr. Docket No. 187) was denied as unripe. See Appellant's Brief, Exhibit 7, p. 16. The Bankruptcy Court determined that at the time Pequeno filed his motion, Schmidt has not submitted any actual claim for fees. *Id* at 15. The Bankruptcy Court gave Pequeno leave to file his motion again when Schmdit submitted a claim for administrative fees. *Id*. at 16. Pequeno never re-filed his motion when the issue of administrative fees were ripe. *Id*. This Court cannot consider what may have developed during a later hearing because Pequeno never re-filed his motion. See Sequa Corp., 28 F.3d at 514 (holding that a district court cannot make new factual findings on appeal). For these reasons, Pequeno's appeal is **DENIED**.

III. Schmidt's Hiring of the Law Offices of Michael B. Schmidt as General Counsel for the Bankruptcy Estate

Nevertheless, should this Court consider the objection as having been timely made and appropriate, the law would still require denial of the appeal. Pequeno argues that the Bankruptcy Court erred in denying in Motion because Schmidt should not have been allowed to hired his own law firm. He urges this Court to consider the hiring of the Schmidt firm to be a violation of Section 327 of the Bankruptcy Code (the "Code").

Section 704 of the Bankruptcy Code establishes a list of duties that a Trustee must undertake him or herself. 11 U.S.C. & 704. Section 327 of the Code, however, lists situations where the Trustee can hire outside counsel. See 11 U.S.C &327. Section 327 reads, in relevant part:

> (a) Except as otherwise provided in this section, the trustee, with the court's approval, may employe one or more attorneys..that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title....
>
> (d) The court may authorize the trustee to act as attorney...for the estate if such authorization is in the best interest of the estate.

11 U.S.C. §§327(a), (d). A trustee may employ his own firm if it has no adverse interest to the bankruptcy estate, is disinterested, and is in the best interest of the estate. In re Gem Tire & Serv. Co. 117 B.R. 874, 876-77 (S.D. Tex. 1990) (citing In re First Colonial Corp. of Am., 544 F.2d 1291, 1297 (5th Cir. 1977)). One court notes that when handling a smaller estate, the hiring of the trustee's own firm might be more efficient and economical that the hiring of outside counsel. In re Kieffer, 306 B.R. 197, 212 (N.D, Ohio 2004).

Schmidt contends he complied with Section 327(d) when he made the application for the authority to hire his firm as general counsel. (Bankr. Docket No. 36). He identified 15 specific reasons why he thought hiring his firm would be beneficial to the bankruptcy estate, including: assisting the Trustee in the handling of non-routine sales, assisting the Trustee in the handling of non-routine objections to proof of claims, representing the estate in adversary and contested matters, and analyzing, investigating and prosecuting various claims. Id. None of these appear to be among the specific duties the trustee must undertake himself as required by Section 704 of the Bankruptcy Code. See 11 U.S.C & 704. The Bankruptcy Court held that the Schmidt firm was a disinterested person and the employment of the firm was in the best interest of the estate and authorized the Schmidt firm to serve as general counsel for the estate. (Bankr. Docket No. 40).

Pequeno appears to argue a single ground for demonstrating the employment of the Schmidt firm violated Sections 327(a) and (d). First, Pequeno argues that Schmidt created a conflict of interest by violating his fiduciary duties as trustee. Pequeno claims that Schmidt's proof of claim shows that Schmidt negligently failed to inform creditors that the judgment turned Pequeno's bankruptcy petition into an "asset" case. The Bankruptcy Court noted in its hearing on Pequeno's motion that Schmidt complied with all requirements of providing notice to creditors. See Appellant's Brief, Exhibit 7, p. 12 (Docket No. 8)). In fact, it was Pequeno who caused improper notice to go to creditors because he failed to list the cause of action in his initial bankruptcy filings. (*Id* at pp. 14-15). Pequeno's brief merely reiterates these allegations. See Appellant's Brief. Pequeno provides this Court with no basis on which to believe the Bankruptcy Court's determination was anything but correct, let alone clearly erroneous. Pequeno offers no credible reason why the Bankruptcy Court's finding should be disturbed.

IV. Schmidt's Hiring of the Law Offices of Frank Costilla

Pequeno also claims that the Bankruptcy Court's authorization to Schmidt permitting him to hire the Costilla firm in violation of Section 327(e) of the Code. This section reads:

> (e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

11 U.S.C. § 327(e). Section 327(e) promotes "economy in administration" by "recognizing that continuing the retention of pre-petition counsel/creditors will avoid wasteful experience and delay that might result from having to hire disinterested counsel unfamiliar with the subject matter." In re Southern Kitchens, Inc. 216 B.R. 819, 826 (Bankr. D. Minn. 1998). "Whether an attorney possesses an adverse interest is a question of fact." In re West Pointe Properties, L.P. 249, B.R. 273, 285 (Bankr. E.D. Tenn. 2000).

Schmidt filed an application to employ the Costilla firm as special counsel with the Bankruptcy Court on June 13, 2002. (Docket No. 31). The Bankruptcy Court approved this order, finding that the Costilla firm had not "interest adverse to the Debtor or to the Estate" and that the employment of the firm was in the best interest of the estate. (Docket No. 32). The court authorized the Costilla firm to:

Defend the appeal of [Pequeno's] judgment against the City of Brownsville in any court of competent jurisdiction and to negotiate a settlement of such judgment and/or appeal, as well as any claims and causes of action of the Estate arising from the judgment or its appeal.

Pequeno again appears argue that Schmidt's alleged failure to provide notice to creditors regarding whether Pequeno's petition was an 'asset' or 'non-asset' case created a conflict of interest with regard to the employment of the Costilla firm. He argues the Costilla firm, along with the Schmidt firm, showed a "personal conflict of interest when they failed to inform Debtor and creditors of their true intentions." Appellant's Brief at p. 7. Again, the Bankruptcy Court explained to Pequeno that Schmidt was not negligent in providing notice to creditors, but rather it was Pequeno's missteps that created the need for correction. See supra Section III.

Further, "all legal and equitable interests of the debtor in property as of the commencement of the case" become part of the bankruptcy estate under the exclusive control of the bankruptcy trustee. 11 U.S.C.& 541(a)(1). All pending causes of action initiated by the debtor become part of the bankruptcy estate, subject to the sole discretion and control of the bankruptcy trustee. Matter of Wischan, 77 F.3d 875, 877 (5th Cir. 1996). The settlement proceeds of a cause of action settled during the pendency of a bankruptcy petition are

also the property of the bankruptcy estate as of the commencement of the bankruptcy case. Id. The trustee becomes the "real party in interest." See Mele, 127 B.R. at 84. The trustee has the authority to act for the benefit of the estate and may settle, sell or abandon a cause of action as necessary. See In re Lopez, 283 B.R. 22, 32-33 (B.A.P. 9th Cir. 2002).

As of the filing of the bankruptcy petition, Pequeno no longer sole control of his employment law action. Pequeno failed to mention the pending action as part of his schedule of assets as required by the Bankruptcy code, but this does not negate the plain meaning of 11 U.S.C & 541(a)(1) that Pequeno no longer had any interest in the action or the subsequent settlement. See Wischan, 77 F. 3d at 877. Because Pequeno had no interest in the case or settlement, the Costilla firm did not have any adverse interest to an interest of Pequeno when Schmidt hired the firm to handle the appeal and the settlement. Pequeno again fails to provide any evidence why the Bankruptcy court's authorization of the employment of the Costilla firm, in particular, was clearly erroneous. As such, this Court will not disturb the Bankruptcy court's findings.

This court also notes that the settlement of Pequeno's employment action was confirmed by the Bankruptcy Court and that both the settlement and the distribution to the administrative creditors were recently upheld by the Fifth Circuit Court of

Appeals. See In re Pequeno, 2007 WL 2461866 (5th Cir. 2007).

V. CONCLUSION

For the myriad of reasons discussed above, this Court AFFIRMS the Bankruptcy Court's Order Denying Debtor's Motion to Deny Administrative and/or Recovery Fees and DENIES Pequeno's appeal (Docket No. 1) of said order. Pequeno provides this Court with no additional facts to show that the Bankruptcy Court's determination was clearly erroneous.

Further, in so much as this matter is the last of numerous appeals filed by Mr. Pequeno, this Court therefore DENIES Schmidt's Motion to Dismiss Multiple Appeals (Docket No. 21) as being moot. All other pending motions in this case are DENIED as moot. This order is a final judgment in Civil Action No. B-05-071 and the clerk is hereby ordered to close the case.

Signed this 27th day of September, 2007.

/s/ Andrew S. Hanen
United States District Judge

APPENDIX C

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
-BROWNSVILLE DIVISION-

	§	[Filed 10/8/2004]
JUAN PEQUENO	§	
	§	Civil No.
DEBTOR,	§	01-24255-B-13
	§	

ORDER DENYING DEBTOR'S MOTION TO DENY ADMINISTRATIVE AND/OR RECOVERY FEES

The Court has considered Debtor's "Motion to Deny Administrative and/or Recovery Fees for Chapter 7 Trustee, Michael Schmidt, Trustee's Firm and Costilla's Firm" (the "Motion")

The Motion is **DENIED**.
It is so **ORDERED**.
Dated: October 8, 2004

/s/ Richard Schmidt
United States Bankruptcy Judge